must inform you that before we can arrange to settle your bills by instalments, will you please confirm by return post, at the earliest possible date, your Kuala Lumpur manager's statement that your company do not wish to have further dealing with us, and that we are not agent for your goods any more.

In the event that if we failed to receive a reply within seven (7) days from the date of this letter we will treat it that you have given your confirmation as such."

Where there is no firm agreement which binds the vendor in definite terms to supply goods to another at a price certain over a stipulated period, I fail to see how the former should not be at liberty to refuse to deal further with a customer who has been in breach of his obligation to pay for goods already sold and delivered. No authority is needed in support of this proposition. Here, moreover, the customer had been given notice that he would not be supplied any more goods on credit unless overdue bills were first settled. He refused to pay unless he was supplied more goods on credit. He had no such right by agreement. It is therefore clear that he and not the other party was in breach of contract: see *Withers* v. *Reynolds*[4] and *Martin* v. *Stout*.[5]

For the above reasons I would dismiss this appeal with costs.

Gill and Ali F.JJ. concurred.

Appeal dismissed.

Solicitors: *Shearn Delamore & Co.; Lim Beng Cheang & Co.*

APPUHAMY v. DATO' AJIT SINGH

[FC. (Ong C.J. (Malaya), Gill & Ali F.JJ.) December 9, 1969]

[Kuala Lumpur — Federal Court Civil Appeal No. X66 of 1969]

Master and Servant — Contract of employment — Implied term — Claim for salary during incapacity from illness — Retirement benefit — Collective agreement — Collective agreement not binding on workman not member of union.

Industrial Law — Salary during incapacity — Retirement benefit — Collective agreement with trade union — Workman not member of trade union — Whether employer ought to pay such retirement benefit.

The appellant had been employed as a master cutter in the tailoring department of Gian Singh & Co. for over 40 years. In 1965 he fell ill and was in hospital from June to November. On February 23, 1966 he retired from the respondent's services by mutual consent. The employers had entered into a collective agreement with a trade union of their employees and this provided for payment of salary during illness, medical expenses and retiring benefits. The appellant was not a member of the trade union. The appellant had not been given any notice terminating his service and he had not been paid any salary since July 1965. He claimed, *inter alia*, 8 months' unpaid salary and compensation upon his retirement. His claim was dismissed in the High Court and he appealed to the Federal Court.

Held, allowing the appeal: (1) in the circumstances of the present case there was no term express or implied that no salary was payable during incapacity and therefore the respondent was liable to pay the appellant his salary during his absence from work through illness, so long as the contract is not determined by proper notice;

(2) in the circumstances of this case an implied term could be inferred to pay a reasonable sum on retirement and as the respondent in this case had entered into a collective agreement with his employees to pay such retirement benefit, he ought to pay the respondent a retirement benefit on a scale not less than that set out in the collective agreement.

Cases referred to:-

(1) *Blay* v. *Pollard* [1930] 1 K.B. 628.

(2) *Esso Petroleum Co. Ltd.* v. *Southport Corporation* [1956] A.C. 218.

(3) *Orman* v. *Saville Sportswear Ltd.* [1960] 1 W.L.R. 1055, 1964-5.

(4) *O'Grady* v. *M. Saper Ltd.* [1940] 2 K.B. 469.

(5) *Petrie* v. *Mac Fisheries Ltd.* [1940] 1 K.B. 258.

(6) *Reigate* v. *Union Manufacturing Co.* [1918] 1 K.B. 592, 605.

FEDERAL COURT.

Richard Talalla for the appellant.

Dato' Athi Nahappan for the respondent.

Cur. Adv. Vult.

Ong C.J.: The appellant, a master cutter in the tailoring department of Gian Singh & Company, had been in the service of the respondent's late father and then the respondent for almost two score years, since 1926. He is now 68. He had two short spells of illness in 1960 and 1963 during which he was paid his full salary. On June 12, 1965 he suffered from angina pectoris and diabetes and was admitted into hospital. Except for short breaks he remained there till November 1965. After his discharge he went in December to see the respondent about resumption of his duties. As a result of what took place he continued to stay away from work until February 23, 1966 when he retired from the respondent's service by mutual consent. Prior thereto he had not been given any notice terminating his employment. He had not been paid any salary since July 1, 1965. A claim for retirement benefits being rejected by his former employer, the appellant issued a writ on June 29, 1966 claiming *inter alia* eight months' unpaid salary at $600 per month and compensation upon his retirement. His claim was dismissed by the judge and he now appeals to this court.

The decision of the learned trial judge turned solely on a question of fact. After setting out the circumstances leading to the appellant's retirement the judge said:

"If those were the only facts of the case, it would be fairly simple to come to a decision on the claim, but at the beginning of 1963 a new element was introduced affecting the terms and conditions of service of all the employees of the firm. The evidence shows that the employees of the firm formed themselves into a union of employees which became affiliated to the National Union of Commercial Workers. The plaintiff was one of the members of the employees' union during its inception and was apparently instrumental in getting the union and the management to agree to negotiate new terms and conditions of service for the employees. On 30th January 1963, the Union and the company signed a collective agreement which stipulated *inter alia*, for salary during the period of illness, medical expenses and retiring benefits. The plaintiff was apparently not satisfied with the terms negotiated by the union and as a result he ceased to be a member of the union and had consistently refused to

accept any of the benefits conferred by the agreement.... At the time the collective agreement was signed, the plaintiff was still a member of the union and since the agreement makes specific provision regarding wages during the period of illness, retiring benefits, etc., the question of the rights of the plaintiff has ceased to be a matter of implication."

In holding the collective agreement binding on the appellant I regret to say that the judge was in error. He had misread the evidence. According to the appellant he was only for a few months in 1962 a member of the union; he came to know of the terms of the agreement but found them unacceptable; as a result he "ceased paying union subscriptions 3 or 4 months prior to February 1963". This fact was corroborated by an independent witness, Bahari Lal Sharma, who was an employee of the respondent for the past 17 years and chairman, since 1962, of the Gian Singh Section of the National Union of Commercial Workers. He said:

"Plaintiff attended all meetings of the union up to December 1962.... Since December 1962 he has not paid his subscription. He left because he did not agree with the terms of the agreement."

The agreement, it may be observed, was not signed till January 30, 1963 — after the appellant's resignation from the union. Consequently the collective agreement could not rightly be held binding on the appellant who, at all relevant times, was not a member of the union.

The appellant's salary claim was for the eight months, from July 1965 to February 1966, covering the period of his hospitalisation and enforced convalescent leave. He stated that when he reported back for duty on December 23, 1965 he was fit enough and willing to work. Since then he had not been ill again or gone into hospital. In his defence the respondent pleaded that "it was an implied term of the contract of service that the plaintiff should be physically capable of carrying out his service and that the defendant should have the right to treat the contract of service as at an end in the event of the plaintiff being permanently incapacitated". It was further pleaded that the contract became frustrated in June on account of the plaintiff's physical incapacity, "by reason whereof the defendant was obliged to treat and had treated the plaintiff's contract of service as at an end with effect from 1st July 1963."

This defence, however, does not appear to have been borne out by the evidence. On the contrary, the respondent admitted that he did not give the appellant any notice terminating his employment. Nor, more than three months after the appellant went into hospital, did the respondent elect to exercise the right he claimed of terminating the contract of service. The continuation of the master-and-servant relationship is revealed in the letter of October 9, 1965 written by the respondent to the specialist in the General Hospital at Kuala Lumpur, as follows:

"MR. G.K. SEDRIS APPUHAMY AGE 65 YEARS.

Mr. Sedris Appuhamy, an employee of mine has been in and out of the hospital since 1st week of June 1965 and has been absent from duty since then.

I shall appreciate if you will kindly advise us as to how long he is likely to be hospitalised and to his fitness to continue employment in my firm as a Cutter in our Tailoring Department.

I may add here that our Tailoring Department is situated on the 1st floor of our building.

We have with us sick certificates issued to Mr. Sedris Appuhamy by your Assistant Doctors, as follows:

Issued on 28.6.1965 unfit for duty from 12.6.65 to 4.7.65
Issued on 31.7.1965 unfit for duty from 13.7.65 to 16.8.65
Issued on 18.8.1965 unfit for duty from 1.8.65 to 22.8.65
Issued on 23.8.1965 unfit for duty from 23.8.65 to 6.9.65
Issued on 20.9.1965 unfit for duty from 10.9.65 to 26.9.65

Up-to-date, we have no news if he is still unfit for duty. In addition to the above he has also been in and out of the hospital from 1963 onwards."

This letter is incontrovertible evidence that the appellant had not absented himself without keeping his employer informed and showing cause. The respondent himself was in error when he said that the sick certificates were not given to him until December.

It was thus established beyond doubt that the appellant's employment subsisted, notwithstanding his physical incapacity, until October 1965, and that the respondent took no steps to terminate it thereafter. On this point there is indeed further evidence in the appellant's favour: first, the respondent's admission, in re-examination, that the appellant "frustrated his own contract by staying away from work for 6 months" and, secondly, the notification, under section 64(5) of the Income Tax Ordinance, sent by the respondent to the Comptroller of Income Tax, which is Exhibit P.15. The sub-section reads:

"Where an employer ceases or is about to cease to employ in the Federation an individual who is or is likely to be chargeable to tax under paragraph (b) of sub-section (i) of section 10 of this Ordinance, he shall give notice thereof in writing to the Comptroller not later than one month before such individual ceases to be employed in the Federation, stating the name and address of the individual and the expected date of cessation:

Provided that the Comptroller may accept such shorter notice as he may deem reasonable."

Failure to comply with these provisions constitutes an offence and renders the person responsible liable on conviction to a penalty not exceeding $1,000. In the notification the "expected date of cessation of employment" of the appellant was stated to be "30.6.1965", but the notification itself bears the date it was sent, "27th June 1966". This was long after the respondent received notice of intended action from the appellant's solicitors which was dated March 18, 1966. Clearly, therefore, the appellant's employment was never terminated by any act of his employer until it was ended by mutual consent in February 1966.

Since the employment so continued until February 1966, was it on the implied term that no salary was payable during incapacity? On this ground only could the respondent have denied liability. This, however, was not his defence; what he specifically pleaded was that the implied term postulated physical capacity in the appellant to perform his duties and the latter's incapacity by illness entitled the respondent to, and he did, terminate the contract of service with effect from July 1, 1965. If the respondent relied on an implied term of a different character, it should have been pleaded and an amendment made when the necessity for so doing became apparent. This, however, was not done

and I do not think it permissible for the respondent now to rely on a defence which was never raised. Cases must be decided on issues on the record; if it is desired to raise other issues they must be placed on the record by amendment: see *Blay* v. *Pollard*[1] *per* Scrutton L.J., and *Esso Petroleum Co. Ltd.* v. *Southport Corporation*.[2] *per* Lord Radcliffe.

Apart from being disentitled to rely on a defence not pleaded, the respondent, I fear, has been unable to discharge the onus of establishing the implied condition invoked by him, that no salary was payable to the appellant during his illness. A case in point is *Orman* v. *Saville Sportswear Ltd.*,[3] where Pilcher J., after a review of various authorities, said as follows:

"Having considered all these cases and the careful argument addressed to me by counsel, it seems to me that they establish the following proposition. Where the written terms of the contract of service are silent as to what is to happen in regard to the employee's rights to be paid whilst he is absent from work due to sickness, the employer remains liable to continue paying so long as the contract is not determined by proper notice, except where a condition to the contrary can properly be inferred from all the facts and the evidence in the case. If the employer — and, of course, it will always be the employer — seeks to establish an implied condition that no wages are payable, it is for him to make it out..."

I would respectfully follow that decision. In the circumstances of the instant case, I do not think the respondent could have seriously suggested that he had objections to paying any salary whatesoever to an old and faithful servant who had the misfortune to suffer temporary incapacity through illness — particularly in the case of a master cutter who was not a common employee easy to replace at short notice. At any rate, during shorter spells of illness in 1960 and 1963, the appellant had suffered no loss by deduction of salary. I can find no evidence to support such implied term, as there was in the cases cited, namely, *O'Grady* v. *M. Saper Ltd.*[4] and *Petrie* v. *Mac Fisheries Ltd.*[5] On the contrary I think it is safe to assume that, had the question been raised at any time, the respondent would have unhesitatingly agreed to pay his employee his wages during illness and the latter would have been right to assume readiness on the part of his employer to do so. Were it otherwise, I feel certain that the appellant would have sought employment elsewhere.

Where and when an implied term will be inferred by the courts is laid down in a classic passage from the judgment of Scrutton L.J. in *Reigate* v. *Union Manufacturing Co. (Ramsbottom), Ltd.*[6] as follows:

"A term can only be implied if it is necessary in the business sense to give efficacy to the contract; that is, if it is such a term that it can confidently be said that if at the time the contract was being negotiated some one had said to the parties, 'What will happen in such a case,' they would both have replied, 'Of course, so and so will happen; we did not trouble to say that; it is too clear."

The circumstances of the instant case, in my view, strongly favours the inference of payment during illness.

In this connection, however, counsel has drawn the attention of this court to a letter of March 19, 1966 from the appellant's solicitors to the respondent, referring exclusively to the claim to retirement benefits. It was argued that the discreet silence maintained concerning non-payment of salary must be regarded as significant, tantamount to a waiver thereof. For my part, I do not think any such inference is a logical deduction from the omission. Considered in its proper context and having regard to the circumstances under which the letter came to be written, I do not think it may fairly be construed as an admission negativing all possibility of an implied term for payment of salary during illness. At that juncture it would seem that the only real bone of contention was the quantum of retirement benefit. The statement (Ex. P.9) then rendered to the appellant indicates, to my mind, that liability to pay had been accepted in principle by the respondent — but only at union rates and no more. Consequently the payment of salary was not then in issue calling for mention, whether incidentally or otherwise. (For a parallel instance where an omission was held inoperative as a waiver see again *Orman's* case at p. 1067). On the whole of the evidence, therefore, I think the claim to salary must succeed. The sum due is $4,800.

As regards the other head of claim I am of opinion, from reading the record, that the appellant was perfectly truthful. He must have been concerned about provision for his future — when he would have to retire. It is but natural that he should have broached the subject, from time to time, in veiled terms, perhaps, which could give no offence to his employer. I think it is equally true, as the respondent said, that "he never made any promise". He had, of course, little reason to remember, since no promise was called for where nothing in the nature of a demand was made. That, however, does not mean there was not some sort of tacit understanding that the appellant would be suitably compensated, when the time came, in a reasonable sum. The respondent could not, as a reasonable man, have intended to pay an old employee absolutely nothing on his retirement. I do not think the respondent's repudiation of liability meant that he refused to pay any sum whatsoever. Indeed, proof of his intention to pay may be seen in Ex. P. 9. It was the statement prepared by his accounts department, showing the appellant's entitlement, at union rates, to a retirement benefit of $1,400.40, being 3 per cent of $46,680, which was the salary he earned during the 15 years preceding. To that sum there was added a further sum of $1,486.41, being accrued salary increments, again at union rates, which had been offered to, but refused by, the appellant for the reason given by him, namely, that he did not accept the increases because on his retirement he expected something more than the amount indicated in his income tax return. He was, however, assessed on the higher amount of salary stated in the returns submitted by the employer and had paid tax accordingly. The total of both sums came to $2,886.81. When this head of claim, too, was dismissed by the judge, the order he made expressly left it to the appellant to pursue his claim to retirement benefits under the union agreement, should he so desire. This, to my mind, implies recognition that the appellant's claim was just — though he had no other recourse but to the union for relief. With respect, I think this remedy is wholly illusory, since he was and is not a member of the union. If the appellant has a legal right, he should have his remedy. The court owes a duty to the litigant

whose right is recognised. This claim to retirement benefits must, of course, be based on an implied term of the contract of service, just as much as the claim to salary during illness. The underlying principles, as stated by Scrutton L.J., in his judgment quoted earlier, is an unhesitating assumption of *consensus ad idem* in respect of any tacit agreement. In the circumstances of this case it seems to me that, while an implied term to pay a reasonable sum would have been the proper inference before the negotiation of the union agreement, the conclusion of that agreement on January 30, 1963 altered the situation, at least in so far as the employer was concerned. It can no longer be assumed, as a matter of course, that the respondent did not consider himself, as he claimed, in no position to give the appellant preferential treatment. The fact that the appellant believed otherwise cannot be a substitute for *consensus* where in fact there was none — except to a limited extent. Consequently, the appellant must be content with half a loaf rather than no bread. The respondent was clearly willing to pay, by way of retirement benefits, the amount stated in writing in Exhibit P.9, as being in accordance with the union agreement. I have carefully considered whether the amount stated can be split and have come to the conclusion that it cannot. The portion ascribed to retirement benefits was based on the union agreement and that agreement itself provided for a scale of salary increments upon which the retirement benefits should be calculated. The two parts are consequently not severable. The 3 per cent of total salary had to be calculated on a salary scale which was only $450 per month at its lowest. The court cannot make a new scale in place of the one which exists. In my view, therefore, the appellant ought to be awarded the whole of the amount offered, that is to say, $2,886.81, by way of retirement benefits.

I would accordingly allow this appeal and give judgment in the appellant's favour for the sum of $7,686.81, with interest at the rate of 6 percent per annum from July 1, 1966, the date the writ was served on the respondent, and costs.

Gill and Ali FJJ. concurred.

Appeal allowed.

Solicitors: *Richard Talalla & Co; Athi Nahappan & Co.*

CHIN KIM & ANOR. v. LOH BOON SIEW

[F.C. (Ong C.J. (Malaya), Gill & Ali FJJ.) December 9, 1969]

[Kuala Lumpur — Federal Court Civil Appeal No. X.80 of 1969]

Contract — Repudiation by one party to a contract — Effect of — Option of other party — Delay in exercising rights under contract — Inference of acquiescence in repudiation — Claim for specific performance cannot succeed — Contracts (Malay States) Ordinance, 1950, s. 40.

The parties had entered into a contract for sale of land in Kuala Lumpur on May 16, 1961. One of the conditions of the contract was that on payment by the purchaser of the sum of $40,000 the vendors undertook to take steps to apply to the Rent Assessment Board for permission to evict the tenants on the land. It was also provided that if the vendors were unable to give vacant possession of the land they would refund the sum of $40,000 to the purchaser. The purchaser on May 5, 1962 purported to exercise his option under the contract of sale and sent $40,000 to the vendors. Subsequently on or about June 8, 1962 the deposit was returned by the vendors on the ground that the option had not been duly exercised. The purchaser took no further steps until the writ in the action was issued on August 29, 1966, in which he claimed specific performance of the contract. The High Court having ordered specific performance, the vendors appealed.

Held, allowing the appeal: in this case on repudiation of the contract by the vendors the purchaser should have made his position clear as to whether he accepted the repudiation or refused to accept it; in view of the delay of the purchaser, the proper inference was that he had accepted the rescission. In the circumstances he was not entitled to specific performance.

Cases referred to:-

(1) *White & Carter (Councils) Ltd.* v. *McGregor* [1962] A.C. 413, 427.

(2) *Frost* v. *Knight* L.R. 7 Ex. 111, 112.

FEDERAL COURT.

R. R. Chelliah for the appellants.

Ng Ek Teong for the respondent.

Cur. Adv. Vult.

Ong C.J.: This is an appeal against the decision of the High Court at Kuala Lumpur given on June 19, 1969 ordering specific performance by the vendors of an agreement dated May 16, 1961 for the sale of land.

Wong Choong and Chin Kim, his wife, were the registered co-owners in equal shares of a piece of land at Treacher Road in the residential zone of Kuala Lumpur. Loh Boon Siew was in search of a suitable place for his motor-car showrooms. On May 16, 1961 they entered into an agreement for the sale and purchase of this land at the price of $160,000 or approximately $4 per square foot. Situate on the land were the vendors' family residence and some out-houses let to tenants protected under the Control of Rent Ordinance 1956 then in force. As the land was required by the purchasers for commercial purposes, the agreement contained certain stipulations relating to planning permission to be applied for and proceedings taken by the vendors thereafter for ejectment of their tenants so as to be able to give the purchaser vacant possession.

Briefly, the agreement was as follows. In consideration of $1,200 paid to them by the purchaser the vendors granted him an option of purchase at the price of $160,000 to be exercised within 6 months. During such period the purchaser was to supply plans for submission by the vendors to the authorities for planning permission. Upon receipt of such permission the purchaser was to pay the vendors forthwith the sum of $40,000 by way of deposit to account of the purchase price and the balance of $120,000 within 6 months thereafter; but, in the event of permission being refused, the option was to be automatically extended for a further 6 months, so that the expiry date became 12 months from May 16, 1961. In the event planning